

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2015-262**

**MELENA W. LAMB**

**APPELLANT**

**VS. FINAL ORDER  
SUSTAINING HEARING OFFICER'S  
FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND RECOMMENDED ORDER**

**CABINET FOR HEALTH AND FAMILY SERVICES**

**APPELLEE**

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The Board, at its regular September 2016 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated August 12, 2016, Appellant's Exceptions, Appellant's Motion and Request for Oral Arguments, Appellee's Response to Exceptions, oral arguments and being duly advised,

**IT IS HEREBY ORDERED** that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

**SO ORDERED** this 13<sup>th</sup> day of September, 2016.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK, SECRETARY**

A copy hereof this day sent to:

Hon. Blake A. Vogt  
Hon. Amealie R. Zachary  
Mr. Jay Klein

COMMONWEALTH OF KENTUCKY  
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V. FINDINGS OF FACT, CONCLUSION OF LAW  
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CABINET FOR HEALTH AND FAMILY SERVICES

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This matter came on for an evidentiary hearing on May 12, 2016, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Colleen Beach, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Melena W. Lamb, was present at the evidentiary hearing and was represented by the Hon. Amealia R. Zachary. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Blake A. Vogt.

**BACKGROUND**

1. Appellant, **Melena Lamb**, testified on her own behalf. She was hired on November 1, 2014, as a Social Service Worker I (SSWI) in the Two Rivers Service Region.

2. Appellant stated that she was born on August 7, 1962. At the time of her termination, she was 52 years old. Prior to accepting the job with DCBS, she had spent most of her adult life as a housewife. When her husband was injured, she unexpectedly became the family's breadwinner. She worked part-time at Movie Gallery before she was hired by the Cabinet.

3. On December 18, 2014, Appellant was seriously injured in an automobile accident as she drove home from work. She broke both ankles and her left wrist, and tore a vein attached to her pancreas. She also sustained an injury to her right eye. She was hospitalized for a month, then transferred to a rehabilitation facility.

4. On April 1, 2015, her physician, Dr. Jacob O'Neil, released her to stand and walk. On June 15, 2015, Dr. O'Neil released her to return to work with the following restrictions: she could not stand or walk for more than 30 minutes per hour, and she was restricted from picking up more than 5 pounds with her left hand. Dr. O'Neil documented these restrictions in a "CHFS Accommodation Request Form," introduced into the record as Appellant's Exhibit 1. On the form, Dr. O'Neil also noted that Appellant's mobility and balance were limited.

5. Upon her return to work, Appellant was put on a "Temporary Modified Duty Plan." She primarily performed secretarial work, as well as research, and typing notes. She was able to attend one day of training during this time.

6. In June 2015, she was walking with a Rollator (a wheeled walker). One week after her termination, she was able to walk with a cane. A month prior to the evidentiary hearing, Appellant had progressed to the point of being able to walk unaided.

7. Sometime in July, 2015, Appellant began conversing with Larry Ibershoff, an Administrator in the Office of Human Resources Management. He had initiated contact with her to inquire about her condition and anticipated recovery. "He asked me if I would voluntarily demote to another position that would not be difficult for me physically," Appellant stated. Appellant responded to Ibershoff that she "...[D]efinitely had no intention of quitting. I was not sure how recovered I was going to get. We had some conversations about getting more information from my doctor." Ibershoff sent her emails regarding other positions as they became available. Appellant told Ibershoff she would definitely demote to a Family Support Specialist I, which mostly entails office work, if the opportunity arose. "We left it at that," Appellant stated.

8. In an email between Ibershoff and Appellant, dated August 18, 2015, Appellant described her physical limitations: "I am unable to get around like I need to for the requirements of this job. I am still unable to manage steps, both going up and coming down. My walking pace is slow and unsteady, so I believe I will need to find another position in the Cabinet..." (Appellee's Exhibit 2). Appellant explained that she did not want another job, but she needed continued employment. "I didn't want to be a hindrance to the Cabinet," she stated.

9. Appellant testified that sometime between July and September, 2015, another worker was hired in her department. The woman was in her twenties. "I think she was my replacement," Appellant testified.

10. Appellant's "Temporary Modified Duty Plan" was extended until September 23, 2015. In Appellant's estimation, her dismissal - which occurred on September 8, 2015, 15 days before the plan ended - occurred because her new supervisor, Rhonda Welch, "didn't like" her. "She wouldn't let me schedule training," Appellant stated. "Nor would she assign me more tasks."

11. Appellant testified that she asked for more work. She was sitting at a desk, often doing nothing, and was bored. She would ask Welch for more work, but Welch said she was too busy. Eventually, Welch gave Appellant a whole file to organize.

12. Appellant stated that, in her estimation, she would have been able to do home visits during the period of her modified duty. "I could pick up a child with my right arm," she stated.

13. On cross-examination, a letter dated July 1, 2015, from Appellant's physician, Dr. Jacob O'Neil, was introduced into the record as Appellee's Exhibit 1. In the letter, Dr. O'Neil noted that Appellant was given the following restrictions: "Walk/stand up to 30 min/hr, allow to sit as needed. No lifting more than 5 lbs with L arm. No more than 8 hours worked per day." (sic).

14. Appellant stated that she agreed with these restrictions.

15. Appellant agreed that a social worker in her service region must sometimes travel to homes in rural areas, where the terrain can be uneven. She agreed that during a home visit, the worker may need to bend or stoop, or pick up a child.

16. Through Appellant's testimony, an email chain, dated August 25, 2015, between Appellant and Larry Ibershoff was introduced into the record as Appellee's Exhibit 3. In the email, Appellant states, "I wanted to let you know that I have applied for a position at the Veteran's Center in Hanson, Kentucky. The posting ends on the 29th of August. I will be going back to the doctor September 4th so I will have the documentation on my medical status. I can have them fax it to you or I can fax it to you; either way you will receive it. Thank you for all of your help and patience in this matter. I look forward to hearing from you." Ibershoff responded, "Thanks for your help and good luck with the job opening at the Veteran's Center!"

17. Appellant testified that while the August 25, 2015 email documented it was sent from her computer, she did not remember writing it. She noted that the letter was signed "Melena Lamb SSWI/BSW," but she normally signed emails to Ibershoff as just "Melena."

18. Appellant was asked to review a letter from Jay Klein, Appointing Authority, previously introduced into the record as Appellant's Exhibit 3. The September 2, 2015 letter states: "Please note that travel, home visits, court appearances, and working overtime as needed are essential functions of your Social Service Worker I position, and cannot be waived or amended under the ADAA. Also there is no legal mechanism that allows you to voluntarily demote while on initial probation. Consequently, you will soon be receiving a letter from the Cabinet separating you from employment."

19. Appellant stated that, in her estimation, the Cabinet had "blackballed" her. Her interpretation of the language in the termination letter, "You shall not be certified on future registers on DCBS unless DCBS so requests", indicated to her that she could not apply for another position unless someone requested her by name. (Appellant's Exhibit 6).

20. At the end of her testimony, Appellant rested her case. The Appellee Cabinet made a motion for a directed verdict, which was **DENIED** by the Hearing Officer.

21. The Appellee called its first witness. **Heather Cann** is a Service Region Administrative Associate (SRAA). She has been employed by the Cabinet for the past 16 and one-half years. She described her job duties as SRAA as "ensuring that social workers and their supervisors meet the goals of the Cabinet." She was Appellant's second-line supervisor.

22. Cann was asked if an employee had been hired in Appellant's department at the end of Appellant's tenure at the Cabinet. Cann stated that a woman, Patricia Piper, who was in her early forties, started sometime in August 2015. (Cann could not recall the exact date she was hired).

23. Cann testified that hiring staff for the Cabinet "takes three to four months. So the process to hire her would have started quite some time before August."

24. Cann described the physical requirements of the primary job tasks of a Social Service Worker I, as outlined in the Kentucky Personnel Cabinet Position Description, introduced into the record as Appellee's Exhibit 4. Cann's testimony can be summarized as follows:

Task No. 1: Investigation of in-home services, such as removal, may require provision of services across the state. There may be long periods of travel.

Task No. 2: Investigation of complaints requires going into homes, walking throughout the house. A worker may have to exit quickly.

Task No. 3: Preparation of case plans: this can be done in the office setting, but it is preferred that the task be performed in the home, with the family.

Task No. 4: Interviews: Must be done in the field, specifically, in the home of clients, at police stations, or at the court house.

Task No. 5: Other duties as assigned: this may include assisting other workers as needed, and performing service referrals.

25. Cann added that Union County, Appellant's workstation, was very rural. She described residential areas outside of town as having "hills and ruts. A worker may have to park and walk quite a distance to the front door." Visiting some homes could necessitate a worker standing on her feet throughout the visit because "there are some places you would not want to sit down."

26. Cann stated the Social Services Worker 1 position work hours are "posted" as 8:00 a.m. to 4:30 p.m., but that is not the norm. A normal work day is nine and one-half to 10 hours. While Appellant was on the modified work plan, she did not work more than seven and one-half hours.

27. Cann stated that a worker can decline to work overtime, but if she did, "there would be discipline." Cann added that one worker in each county must be on call 24/7. If a child is determined to be in "imminent harm," then a worker must respond within one hour. Workers also occasionally have late home visits, and sometimes late court appearances.

28. Social Workers are also required to testify at court, which mandates that they travel to courthouses in different counties.

29. Cann was asked if an individual could perform the job tasks of a SSWI with a Rollator or cane. She said it was possible, but that it would be hard. Cann stated, "You need good mobility to get out of intense situations. We can't always take the police with us when we visit families."

30. As for Appellant's training, Cann and Appellant's first-line supervisor, Rhonda Welch, both felt that because Appellant had been off work for so long (due to the injuries she had sustained in the car accident), she should start her basic "Academy" training all over. The next session of that training was not going to be until September, 2015.

31. On cross-examination, Cann stated that a few weeks after a worker has completed Academy training, they are required to go on home visits alone, even if they are still on probation.

32. Larry Ibershoff is an Administrator in the Cabinet's Office of Human Resource Management ("OHRM"), a position he has held since November, 2012. His job duties include processing ADA compliance requests. Ibershoff explained that when a Cabinet employee requests an accommodation under the ADA, the case is assigned to one of three investigators. Ibershoff is one of the investigators, and was assigned Appellant's case.

33. Ibershoff stated that after an employee fills out a 'CHFS Accommodation Request Form,' their physician is next asked to complete an "Interactive Process Questionnaire." Ibershoff testified, "We do not contact the physician. We give the questionnaire to the employee and ask them to get it completed." Normally the questionnaire is faxed from the doctor's office directly to OHRM.

34. Ibershoff was asked to review Appellee's Exhibit 2, an email communication between Ibershoff and Appellant on August 18, 2015. Ibershoff stated that he converses every two weeks with employees whose ADA claim he has been assigned. In order to complete his case review, he must "bring the situation to closure." Ibershoff had noted that Appellant's Temporary Modified Duty Plan was set to expire on September 23, 2015. Ibershoff had contacted Appellant that day "to see if she still needed accommodation. Some people get better, and they no longer need an accommodation."

35. Appellant's response to Ibershoff's query regarding her medical status gave him the impression that "she would not be able to return to her job without restrictions." In that situation, Ibershoff typically looks to see if other positions within the Cabinet are available. He looked for an FSSI position for Appellant because that job did not require home visits or court appearances.

36. Ibershoff testified, "I did not know at the time that there were no mechanics for an employee to transfer or demote while on probation." He was informed of this by Howard Jay Klein, Division Director.

37. On cross-examination, Ibershoff stated that once he had received the email from Appellant stating that she could not perform the essential functions of her job, he discussed her situation with his first-line supervisor, Cathy Cox, and Howard Jay Klein. They noted that a few months had elapsed since she returned to work and there did not seem to have been improvement. Based on the information they had at the time—including Dr. O’Neil’s July 1, 2015 letter—it was determined that Appellant could no longer perform her job as Social Service Worker I.

38. **Howard Jay Klein** is Division Director, Division of Employee Management, which handles employee discipline and EEO matters, including ADA issues. At the time Appellant was dismissed, Klein was also Appointing Authority.

39. Klein was asked to address his September 2, 2015 letter informing Appellant that the EEO/Civil Rights Compliance Branch had concluded its review of her June 4, 2015 request for accommodations under the ADA. (Appellant’s Exhibit 3). Klein explained that an ADA determination letter is typically a summary of the review of the employee’s medical information, the essential functions of her job, and a determination of whether reasonable accommodations are available.

40. At the time of her request for ADA accommodation, Appellant was on initial probation. Klein explained that an individual hired into the merit system is on initial probation for typically a six-month period. During initial probation, an employee cannot transfer or be demoted. Klein testified that he terminated Appellant assuming she would re-apply for another job. “Nothing prevented her from re-applying for a desk job,” Klein stated.

41. Klein was asked to explain the following language contained in Appellant’s termination letter, dated September 8, 2015 (Appellant’s Exhibit 6): “You shall not be certified on future registers for employment within the DCBS unless DCBS so requests.” Klein stated that the sentence is standard language in all termination letters, and is used at the Personnel Cabinet’s directive, and is intended, essentially, to address the situation where an employee had been dismissed for an “egregious” reason. Klein noted that Appellant could have simply requested that the register ban be lifted if she wished to apply for another position.

42. On cross-examination, Klein was asked to explain the mechanics of lifting the register ban. Klein answered that if Appellant applied for a position in DCBS, the Personnel Cabinet would contact his office to inquire if the ban could be lifted, and – in the case of Appellant – his office would respond “Yes.”

43. KRS 18A.005(37) reads:



"Status" means the acquisition of tenure with all rights and privileges granted by the provisions of this chapter after satisfactory completion of the initial probationary period by an employee in the classified service;

44. 101 KAR 1:335, Section 3(2)(a) reads:

**Demotion.**

(2) Voluntary demotion.

(a) A voluntary demotion shall be made if an employee with status requests a voluntary demotion on the Voluntary Transfer/ Demotion/ Salary Retention Agreement Form prescribed by the Personnel Cabinet.

45. 101 KAR 1:335, Section 4(1) reads:

**Transfers.**

(1) The transfer of an employee with status shall conform to the requirements established in this section.

46. KRS 18A.111(1) and (2) reads:

**18A.111 Probationary periods for classified service -- Initial and promotional.**

(1) Except when appointed to a job classification with an initial probationary period in excess of six (6) months, and except as provided in KRS 18A.005 and this section, an employee shall serve a six (6) months probationary period when he is initially appointed to the classified service. An employee may be separated from his position, reduced in class or rank, or replaced on the eligible list during this initial probationary period and shall not have a right to appeal, except as provided by KRS 18A.095. The employee may be placed on an eligible list but shall not be certified to

the agency from which he was separated unless that agency so requests. Unless the appointing authority notifies the employee prior to the end of the initial probationary period that he is separated, the employee shall be deemed to have served satisfactorily and shall acquire status in the classified service.

(2) An employee who satisfactorily completes the initial probationary period for the position to which he was initially appointed to the classified service shall be granted status and may not be demoted, disciplined, dismissed, or otherwise penalized, except as provided by the provisions of this chapter.

47. KRS 18A.095(14)(a) reads:

Any employee, applicant for employment, or eligible on a register, who believes that he has been discriminated against, may appeal to the board.

### **FINDINGS OF FACT**

1. The Appellant, Melena Lamb, was hired by the Cabinet on November 1, 2014, as a Social Service Worker I in the Two Rivers Service Region. She was terminated from her position on September 8, 2015.

2. Appellant filed an appeal of her dismissal on October 8, 2015, alleging discrimination. By Interim Order dated March 21, 2016, it was established that the issues for the evidentiary hearing would be Appellant's claim of discrimination based on disability and age over 40 when she was terminated while on initial probation. The burden of proof was placed on Appellant on these claims.

3. On December 18, 2014, Appellant was severely injured in a car accident. She broke both ankles and her left wrist, and tore a vein attached to her pancreas. She also sustained injury to her eye. She was hospitalized for a month, then transferred to a rehabilitation facility.

4. On June 15, 2015, Appellant was released by her physician, Dr. Jacob O'Neil, to return to work with the following restrictions: she could not stand or walk for more than 30 minutes at a time, and she was restricted from picking up more than 5

pounds with her left hand. She was also restricted from working more than 8 hours per day. At the time she returned to work, she was walking with the assistance of a "rollator" (a rolling walker).

5. In accordance with the Cabinet's ADA Accommodation Request Policy, Appellant completed a CHFS Accommodation Request Form on June 12, 2015. Dr. O'Neil submitted an "Interactive Process Questionnaire" on June 16, 2015. In the questionnaire, Dr. O'Neil stated that Appellant had an impairment that substantially limited her major life activities, specifically "limited weight bearing and limited use of her left hand." (Appellant's Exhibit 1).

6. Upon her return to work, Appellant was placed on a "Temporary Modified Duty Plan" (TMDP), which was initially set to expire on July 6, 2015. The TMDP was extended to September 23, 2015. Under the plan, Appellant testified that mostly performed secretarial work, and some research.

7. Appellant's Accommodation Request Form was assigned to Larry Ibershoff, an Administrator in the Cabinet's Office of Human Resource Management (OHRM). Ibershoff communicated with Appellant every two weeks to inquire about her condition and anticipated recovery.

8. On August 18, 2015, Ibershoff emailed Appellant to ask if she anticipated needing a permanent accommodation under the ADAA once her TMDP ended. Appellant responded: "I am still unable to get around like I need to for the requirements of the job. I am still unable to manage steps, both going up and coming down. My walking pace is still slow and unsteady, so I believe I will need to find another position in the Cabinet..." Ibershoff then asked Appellant if she would be willing to accept a voluntary demotion with loss in pay to a Family Social Services I (FSSI) position if one became available. Appellant answered that she would accept an FSSI position in Hopkins or Webster counties. (Appellee's Exhibit 2).

9. After communicating with Appellant via email on August 18, 2015, Ibershoff discussed Appellant's situation with his first-line supervisor, Cathy Cox, and Howard Jay Klein, Division Director. It was noted that a few months had elapsed since Appellant had returned to work, yet her condition had not improved. Ibershoff was informed by Klein that a classified employee cannot transfer or demote while on probation.

10. On August 24, 2015, Appellant emailed Ibershoff to inform him that she had applied for a position at the Veteran's Center in Hanson, Kentucky. She also informed him that she would be going back to her physician on September 4, 2015, and

would fax him the documentation of her medical status. (Appellee's Exhibit 3). At the evidentiary hearing, Appellant first denied that she had sent that email, then stated that she could not recall sending it. No other evidence refuting the authenticity of the email was introduced into the record.

11. From the time Appellant returned to work on June 15, 2015, until her dismissal on September 8, 2015, Appellant was an employee serving an initial probationary period.

12. After learning that Appellant felt she could not physically perform the job duties of the SSWI position, Larry Ibershoff offered to assist Appellant find a "desk job", which would have meant demoting to a FSS-type position. Ibershoff was later informed by Jay Klein that pursuant to administrative regulation, only an employee with status can be demoted or transferred. (101 KAR 1:335, Sections 3 and 4). An employee attains status after she has satisfactorily completed the initial probationary period. KRS 18A.111.

13. Howard Jay Klein testified that he concluded that Appellant's medical condition prevented her from performing the essential functions of her job. Since Appellant could not be demoted while on probation, he terminated her assuming that she would re-apply for another job at the Cabinet. The Cabinet's position was explained to Appellant in Klein's September 2, 2015 letter to her which stated, "...[T]ravel, home visits, court appearances, and working overtime as needed are essential functions of your Social Service Worker I position, and cannot be waived or amended under the ADAA. Also, there is no legal mechanism that allows you to voluntarily demote while on initial probation. Consequently, you will soon be receiving a letter from the Cabinet separating you from employment. Please note that you are welcome to apply to any "desk job" type position available in the Cabinet." (Appellant's Exhibit 3)

14. On September 8, 2015, by a letter signed by Howard Jay Klein, Appellant was informed of her dismissal while on initial probation. (Appellant's Exhibit 6).

15. Appellant asserted at the evidentiary hearing that a woman "in her twenties" was hired in her department sometime between July and September, and was, in Appellant's opinion, hired to replace her. Heather Cann, Service Region Administrative Associate (SRAA), testified that a woman in her forties began working in Appellant's department in August 2015. Cann explained that the Cabinet's hiring process can take 3 to 4 months, and denied that this woman was Appellant's "replacement."

16. Heather Cann described the physical requirements of the Social Service Worker I position as being able to travel for long periods and conducting home visits which may necessitate walking on uneven, rural terrain to reach a client's home, walking throughout the home, and being able to quickly exit the home if necessary. Sometimes a SSW may also need to lift a child, as well as walk from their vehicle to the courthouse or a police station.

17. The Appellant, during the period she was placed on a Temporary Modified Duty Plan, was walking with the assistance of "Rollator" (a rolling walker). Cann testified that while it was possible for SSWI to work with a rollator or cane, it would be difficult.

18. While placed on the Temporary Modified Duty Plan, Appellant was only scheduled to work 7 and one-half hours. Cann stated that SSWIs are generally required to work overtime (including being on call), or there "would be discipline."

19. The Hearing Officer finds that Appellant was on initial probation at the time of her dismissal. Pursuant to KRS 18A.111 and KRS 18A.095(14)(a), an employee on initial probation can be dismissed for any reason except a discriminatory one.

20. The American with Disabilities Act ("ADA") prohibits employers from discriminating against employees based on their disabilities if they are otherwise qualified to perform their jobs. 42 U.S.C. § 12112. To establish a *prima facie* case of disability discrimination under the ADA, the plaintiff must show that (1) she is disabled, (2) she is otherwise qualified for the position, with or without reasonable accommodation, (3) she suffered an adverse employment decision, (4) the employer knew or had reason to know of her disability, (5) the employer either replaced her or left the position open while seeking other applicants. If the plaintiff shows a *prima facie* case of disability discrimination, the burden shifts to the employer to show a legitimate, nondiscriminatory reason for the action taken. If the employer does so, then the burden shifts back to the plaintiff to show that the reason "is actually a pretext for unlawful discrimination." *Howard v. Magoffin County Bd. Of Educ.*, 830 F.Supp.2d 308, 314 (2011).

21. The Hearing Officer finds Appellant did not meet her burden of proof to establish a *prima facie* case of disability discrimination because, at the time of her dismissal, she was not qualified for the SSWI position, with or without a reasonable accommodation.

22. By the Appellant's own admission (contained in her August 18, 2015 email to Larry Ibershoff), she was "unable to get around like I need to for the requirements of this job. I am still unable to manage steps, both going up and going down. My walking

pace is slow and unsteady, so I believe I will need to find another position in the Cabinet.” (Appellee’s Exhibit 2). While Appellant asserted at the evidentiary hearing that she thought she could have performed home visits, and picked up a child with her right arm, the Hearing Officer does not find that assertion convincing. What was developed at the evidentiary hearing is that the physical requirements of home visits require the social worker to possibly have to walk on uneven terrain, climb stairs into the home, and quickly exit the home, if necessary. A worker may also need to pick up a child, which common sense dictates requires the use of both hands. Beyond performing home visits, a social worker is also required to attend court appearances, conduct interviews in the field, and work overtime. Neither the restrictions placed on Appellant at the time by her physician, nor the state of recuperation Appellant described in her multiple emails to Ibershoff, lend credibility to the contention that Appellant was able to perform the essential duties of her position. Furthermore, Appellant did not identify to the Cabinet, or at the evidentiary hearing, any permanent accommodation that would have enabled her to perform the duties of the SSWI position.

23. The Hearing Officer finds Appellant did not meet her burden of proof to establish that she was dismissed due to age discrimination. No evidence was presented by Appellant on this matter other than her testimony that she was 52 years of age at the time of her dismissal, and a vague assertion that a “woman in her twenties” had taken Appellant’s place in the office. Heather Cann, SRAA, testified that a new female worker did begin working in that office sometime in August 2015, but she was in her forties, and the employment process the Cabinet undertook to hire her had begun months before it was determined that Appellant would be dismissed.

24. Appellant testified that the language contained in her dismissal letter (“You shall not be certified on future registers...unless DCBS so requests”) led her to conclude that she had been “blackballed” by the Cabinet. According to Jay Klein, this is the usual language used in all dismissal letters, and is prescribed by the Personnel Cabinet. The Hearing Officer notes that if Appellant wishes to apply for another job at the Cabinet, she would only need to request from OHRM that the certification ban be lifted, which Klein testified they would do.

### **CONCLUSION OF LAW**

Appellant failed to meet her burden of proof to show that her dismissal during her initial probationary period was done due to disability or age discrimination.

**RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **MELENA W. LAMB V. CABINET FOR HEALTH AND FAMILY SERVICES, (APPEAL NO. 2015-262)** be **DISMISSED**.

**NOTICE OF EXCEPTION AND APPEAL RIGHTS**

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

**Any document filed with the Personnel Board shall be served on the opposing party.**

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

**ISSUED** at the direction of Hearing Officer Colleen Beach this 12<sup>th</sup> day of August, 2016.

**KENTUCKY PERSONNEL BOARD**



**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:  
Hon. Blake A. Vogt  
Hon. Amealia R. Zachary